

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4596 OF 2005
M/s. Shankarlal & Sons
Masalawala and anr. ..Petitioners
(Org.Obstructionists)
Vs.
M/s. B.M. Hodiwalla and Sons
and ors. ..Respondents
(No.1-Org.Plaintiff &
Nos.2 to 8 Org.Deft)

Mr. A.K. Abhyankar, Senior Counsel with Mr. R.S.
Patil for petitioners.

Mr. A.V. Anturkar with Mr. S.J. Ghatge for
respondent no.1.

CORAM: B.H. MARLAPALLE,J.

Reserved on : April 05, 2007.

Pronounced on : April 13, 2007.

P.C.:

1. Heard Mr. Abhyankar the learned Senior
Counsel with Mr. Patil for the petitioners and Mr.
Anturkar with Mr. Ghatge the learned counsel for the
respondent no.1.

2. This petition filed under Article 227 of the
Constitution of arises from the Judgment and Order

dated 2/4/2002 passed by the Small Causes Court at Mumbai in Obstruction Notice No. 45 of 1993 and confirmed by the Appellate Bench of the very same court in Appeal No. 437 of 2002 on 1/4/2005.

3. Mr. Anturkar the learned counsel for the respondent no.1 has raised a preliminary objection regarding the maintainability of this petition and on the ground that the impugned orders are required to be challenged by filing a Civil Revision Application under Section 115 of C.P.C. It was contended by him that when a statutory remedy of Civil Revision Application is available to the petitioners, a Writ Petition under Article 227 of the Constitution is not maintainable and in that regard he has relied upon a three Judge Bench judgment in the case of *Sadhana Lodh vs. National Insurance Co. Ltd. and anr.* [(2003) 3

SCC 524].

4. Mr. Abhyankar the learned Senior Counsel with Mr. Patil for the petitioners, on the other hand, submitted that the remedy of filing a Civil Revision Application under Section 115 of C.P.C. is not an efficacious remedy and also the scope of powers under

Section 115 of this court is very limited and, therefore, the petitioners approach this court by filing a Writ Petition under Article 227 of the Constitution should not be denied by relegating to such an alternative remedy. In support of his contentions he relied upon the following judgments:-

(a) Major S.s. Khanna vs. Brig. F.J. Dillon [AIR 1964 SC 497].

(b) Vora Abbasbhai Alimahomed vs. Haji Gulamnabi Haji Safibhai [AIR 1964 SC 1341].

(c) Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and ors. [AIR 1964 SC 1336].

. Undoubtedly, all the decisions relied upon by Mr. Abhyankar deal with the issue of the scope of powers while deciding a Civil Revision Application under Section 115 of C.P.C. and they do not deal with the issue as raised by Mr. Anturkar.

5. The relevant factual matrix of this petition

is that RAE and R Suit No. 638/5257 of 1964 filed by the original landlords was decreed ex parte against the present respondent no.1 and decree of eviction was passed on 1/10/1965. As no steps were taken by the respondent no.1 for setting aside the said ex parte decree, the decree was executed by the landlords against the respondent no.1 on 9/7/1968. However, the warrant of possession was obstructed by the respondent no.2 pursuant to which obstructionist proceedings were adopted by the landlords, inter alia, against the respondent no.2. However, the said proceedings were not prosecuted and as such the notice was discharged on 20/9/1968. On 14/3/1969 consent terms were filed between the landlords and the respondent no.1 in RAE & R Suit No.638/5257 of 1964 whereby the ex parte decree dated 1/10/1965 was agreed to be set aside and the suit was allowed to be dismissed. The petitioners claim to be in possession of the suit premises admeasuring about 10 ft. x 8 ft. on leave and licence basis since 1/12/1968 under an agreement dated 29/11/1968 entered into between the petitioners on the one side and respondent no.2 and deceased Shri Prataprao Narharrao on the other side. The respondent no.1 filed ejectment suit against the respondent no.2

being RAE & R Suit No.643/5222 of 1963 in the court of Small Causes at Mumbai and the said suit came to be decreed on 19/6/1969 ordering the defendant-respondent no.2 to vacate the suit premises within six months. The said decree of eviction was challenged by the respondent no.2 by filing an appeal which was dismissed on 31/10/1980. The respondent no.2 thereafter filed a Writ Petition before this court which was also dismissed on or around 1/7/1991 (Writ Petition No.3706 of 1980). The respondent no.1, therefore, sought to execute the warrant of possession which was obstructed by the petitioners claiming that they were in use and occupation of the suit premises from December, 1968. Obstruction Notice No.45 of 1993 was, therefore, filed in RAE & R Suit No.643/5222 of 1963 by the present respondent no.1 and the same was made absolute by the learned Judge of the Small Causes Court at Mumbai on 2/4/2002 and as noted hereinabove, the said order has been confirmed by the Appellate Bench of the very same court on 1/4/2005. Thus, the petition arises from the Obstruction Notice No.45 of 1993 filed in RAE & R Suit No.643/5222 of 1963.

6. As per the amendment brought into force with

effect from 1/7/2002, the following proviso to

Sub-section 1 of Section 115 has been inserted:-

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

. After the insertion of the said proviso,

Section 115 of C.P.C. has been interpreted by the Apex Court in the case of Shiv Shakti Co-op. Housing Society vs. M/s. Swaraj Developers and ors. **[AIR 2003 SC 2434]** as under:-

"A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is

maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115....."

7. In the instant case, if the appeal decided by the Appellate Bench of the Small Causes Court at Mumbai would have been decided in favour of the present petitioners, Obstruction Notice No.45 of 1993 would have been dismissed and thus the obstruction proceedings could have come to an end. Such an order allowing the appeal would have given finality to the obstruction proceedings and the respondent no.1 would be left to either file fresh eviction proceeding or take resort to any other permissible legal course, but there would be no ways to proceed for execution of the decree passed in RAE & R Suit No.643/5222 of 1963. Even otherwise also the obstruction proceedings have come to an end by the impugned order as well and hence

it cannot be termed as an interlocutory order. Hence the petitioners' remedy lies by a revision under Section 115 of C.P.C. Mr. Anturkar rightly relied upon the following observations made in Sadhana Lodh's case (Supra):-

".....Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution....."

8. In Writ Petition No. 4138 of 2006, the proceedings had arisen from the Bombay Rent Act and vide my order dated 24/8/2006 I have held that a statutory remedy of filing a Revision Application

under Section 115 of C.P.C. was available by following the law laid down in the case of Sadhana Lodh (Supra). The impugned order has been passed in an appeal which was filed under Section 29(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and sub-section (2) therein states that no further appeal shall lie against any decision in appeal under sub-section (1). In the premises, a Writ Petition under Article 227 of the Constitution is not maintainable.

9. Hence, the petition is summarily rejected as not maintainable with liberty to the petitioners to file a Civil Revision Application under Section 115 of C.P.C. If such a revision is submitted within a period of four weeks from today, the order of status quo passed by this court on 16/8/2005 shall be operative for a period of eight weeks from today and the period of pendency of this petition will be taken into consideration for deciding the issue of condonation of delay, if any, in filing the Civil Revision Application. Annexures be returned, if applied for.

(B.H. Marlapalle,J.)